JAN 24 1898
JAMES H. MCKENNEY
CLERK

Brief of Carver & Blodgett for Appellants.

Filed Jan. 24, 1898.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 246.

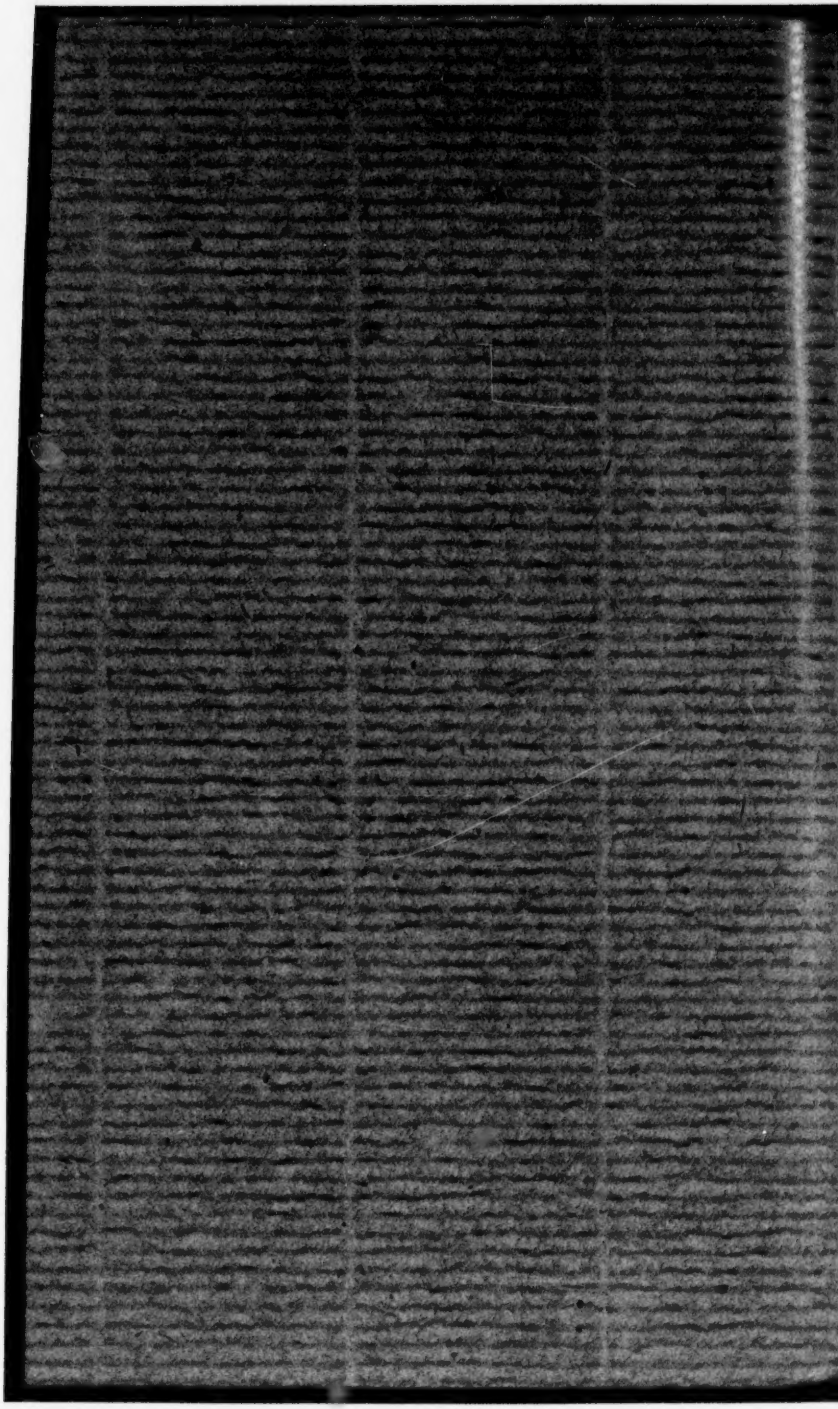
THE "CHATTAHOOCHEE."
ABRAM W. HENDRY et al.,
Libellants, Appellants,

v.

THE OCEAN STEAMSHIP COMPANY,
Claimant, Appellee.

BRIEF FOR APPELLANTS.

EUGENE P. CARVER,
EDWARD E. BLODGETT,
Of Counsel.



Supreme Court of the United States.

No. 246.

THE "CHATTAHOOCHEE."

ABRAM W. HENDRY AND OTHERS,
Libellants, Appellants,

v.

THE OCEAN STEAMSHIP COMPANY,
Claimants, Appellees.

BRIEF FOR APPELLANTS.

This action relates to a collision which took place between the Steamship "Chattahoochee" and the topsail Schooner "Golden Rule." The suit was a libel *in rem* brought by the owners of the "Golden Rule" and the owners of her cargo, in the United States District Court for the District of Massachusetts, the libel being filed on July 31st, 1894. The District Court found both vessels at fault in proceeding at more than a moderate rate of speed in a fog, and caused the damages to be divided. An appeal was accordingly taken to the Circuit Court of Appeals for the First Circuit by the owners of the Schooner, and after hearing, that Court affirmed the decree of the District Court. Application was then made to this Court for a writ of *certiorari*, which writ was granted during the October term, 1896.

STATEMENT OF THE CASE.

The collision took place on July 20th, 1894, at about 4.10 A. M., the place of the collision being in the open ocean, in lat. 40° 36″ North, and long. 59° 40″ West, the nearest land being the Island of Nantucket, about 65 miles distant. The weather at the time was a light fog, and the wind was blowing a moderate breeze from the Southwest.

The Schooner "Golden Rule" was a single-deck topsail schooner of about 200 tons net register, 99 feet keel, 29 feet wide, and 11.2 feet deep.

She was on a voyage from Ponce, a port in the Island of Porto Rico, West Indies, to Boston, and was deeply loaded with a full cargo of sugar and molasses.

At the time of the collision she was sailing on the port tack, with the wind abaft the beam, heading North by East, one-half East, by compass.

Page, Record, p. 16, Ints. 56 and 57.

The master of the Schooner was on deck in charge, a competent seaman was stationed at the wheel, another forward on the lookout, and the mate was sounding a mechanical foghorn forward.

Page (captain), Record, p. 15.
Mullins (mate), Record, pp. 35 and 36.
Wilson, Record, p. 53.
Williams, Record, p. 62.
Broden, Record, p. 67.
Coleman, Record, p. 68.

The evidence is clear that a mechanical foghorn as required by law was sounded in the manner prescribed by the statutes, and this fog signal was heard on board of the Steamship "Chattahoochee" before the collision took place. In fact it was upon hearing this signal that the master of the Steamship gave the order which, without question, was the direct cause of the collision.

She had all her sails set, except one half of her large

lower square sail on her foremast, which sail was taken in that morning at about 2 A. M.

Her speed is in dispute.

The "Chattahoochee" is an iron screw steamship of 1887 tons net register, 300 feet long, and drew at this time 16.6 feet aft and 14 feet forward.

Savage, Record, p. 69, Ints. 20–22.

She was on a voyage from Boston to Savannah, Georgia, having left Boston, July 19th, at about 3.30 P. M. When off Cape Cod, her master, owing to the weather being foggy, decided to go outside, where he could run faster, rather than on the regular course through Vineyard Sound, as the outside course is much clearer of vessels.

Savage, p. 69, Int. 24.

On the morning of the collision, September 20th, at 2 A. M., the steamship was put on a course of southwest half west, *and although the weather had been thick since* 12.30 *A.M.*, and her whistle had been blown during that time, she was still kept at her full speed of about eleven or twelve knots.

The master and the first officer, with the quartermaster, were in the pilot house, about fifty feet from the bow, and a man was on the lookout forward.

Savage, Record, p. 74, Int. 114.

At the time of the collision it was just daylight, although both vessels had their side lights set.

Some time before the collision those on the Schooner heard the Steamship's whistle off their starboard bow; it was duly reported by the lookout to the officer of the deck.

Mullins, the mate, says he first heard it from two to two and one-half points off the starboard bow.

Mullins, Record, p. 35, Int. 61.

The master, when he was able to locate the sound, placed it at four points on his starboard bow.

Page, Record, p. 16, Int. 63.

Wilson, two and one-half to three points.

Wilson, Record, p. 56, Int. 63.

Abbott, the cook, who heard it later, puts it about six points.

Abbott, Record, p. 47, Int. 26.

The sound continued to be heard by those on the Schooner on the starboard bow, and when the Steamship came in sight she was on the starboard side of the Schooner.

The lookout and master of the Steamship say they heard the fog signal of the Schooner. The captain testifying that he heard the signal about two minutes before the collision, all on the Steamship say that they first heard the fog signal of the Schooner on their port bow.

Savage, Record, pp. 70 and 71, Ints. 45 and 48.

The captain of the Steamship says that he thinks he heard the fog signal of the Schooner twice before the collision.

Savage, Record, p. 72, Int. 71.

When the captain of the Steamship first heard the fog signal of the Schooner, he thinks it was almost ahead, but a little on the port bow.

Savage, Record, p. 72, Ints. 73–74.

The second time he heard it, it was abeam (Int. 74).

As soon as he heard the fog signal he gave the order to hard aport, and then gave the order to stop his engine, but did not give the order to reverse full speed.

Savage, Record, p. 76, Ints. 148–150.

When he first saw the sails of the Schooner they bore one and one-half points on his port bow, and during all this time the helm of his vessel was hard aport.

Just before the collision he gave the order full speed ahead.

Savage, Record, p. 76, Int. 152.

On cross-examination he acknowledges that if he had held his course his vessel would have gone clear.

Savage, Record, p. 79.

At the time of the collision the Steamship was heading north-northwest.

Jones (helmsman), p. 95, Int. 36.

The angle of the collision, according to the witnesses' testimony, was about four points, or forty-five degrees. This would confirm the course of the Schooner as north by east, half east, and that of the Steamship as north-northwest, which is exactly three and one-half points, it being agreed by all in this case that the Schooner held her course.

The Steamship, under a hard aport helm, swung from southwest one-half west to north-northwest, a change of nine and one-half points.

The Schooner was struck forward of the fore rigging, cutting her bow off and causing her to sink at once. But for the porting of the Steamship she would have gone clear of the Schooner and under her stern.

The quartermaster thinks that, from the time he heard the fog signal of the Schooner to the time of the collision, it was from three to four minutes.

Jones, Record, p. 97, Int. 60.

The engineer of the Steamship testified that she was going between eleven and twelve knots at the time of the collision.

Henry, Record, p. 100, Int. 45.

The assignment of errors filed by the owners of the Schooner "Golden Rule" are six (6) in number, and raise the questions discussed before that Court and in this brief.

Record, pp. 9 and 10.

ARGUMENT.

The opening sentence in the opinion of the District Court is, — "There can be no question as to the responsibility of the "Chattahoochee" for this collision. She was going at the rate of eleven miles an hour, her highest speed, in a fog of considerable density."

(Opinion of the District Court, p. 10.)

The Steamship therefore stands charged with this fault as no appeal has been taken by her owners or representatives.

We shall discuss this case under the following divisions viz. : —

I. *The faults of the "Chattahoochee" other than those found by the Court.*

II. *That the Schooner "Golden Rule" was without a fault contributing to the collision.*

III. *That if there was any fault on the part of the Schooner "Golden Rule," it was slight in comparison with the faults of the Steamship "Chattahoochee," and if sufficient to cause a division, the damages should be apportioned between the two vessels according to the degrees of fault.*

IV. *The application of the Act of Congress of February* 13, 1893, *known as the Harter Act, to the case.*

I.

The faults of the "Chattahoochee" other than those found by the Court.

The faults of the Steamship alleged in the libel, five in number, are as follows: —

1. Proceeding at an immoderate rate of speed in a fog.
2. Not stopping and reversing as required by law.
3. Not having a proper lookout.
4. Changing her course to starboard instead of to port.
5. Trying to cross the bow of the Schooner.

The learned Judge of the District Court, whose opinion is in the Record on pages 10 and 11, says: "There can be no question as to the responsibility of the 'Chattahoochee' for this collision," on the ground that she was going at the rate of eleven miles in a fog of considerable density, and that even in mid-ocean such a speed is immoderate for a Steamship. It will be noted that no appeal has been taken from the decree finding the Steamship to blame in this particular.

We think that the evidence discloses other faults on the part of the Steamship which we shall herewith discuss.

It is true that the other faults of the Steamship may not be material in the case, except as they bear in one form or another upon the alleged fault of the Schooner, and on the question of damages, but we claim that in these particulars there is a direct application.

The other faults are: —

(a) *Changing her course under a port helm without knowing the location of the sailing vessel whose fog signal she heard.*

There is no question but what the change in the course of the Steamship, by putting her helm to port instead of to starboard, was the direct cause of the collision.

Under this change of helm, the Steamship approached rather than kept away from the Schooner.

In the case of the "Aleppo, "5 Benedict, 554, which was a case of collision not far from Boston, between a Steamship and a Bark, Judge Blatchford, afterwards of this Court says that it was a fault on the part of the Steamship to port her helm, as it caused her to go towards the Bark rather than from her, and that this was one of the causes of the collision. That she should not have attempted to change her course by porting her helm until she knew the exact position of the sailing vessel. In that case the Court says that the order should have been to starboard her helm instead of to put it to port.

This case has a direct bearing on the one before the Court; but for this change of course no collision would have taken place.

See also the "City of New York," 147 U. S. 72.

(b) *Another cause of the collision was the fact that the Steamship did not stop and did not reverse in time.*

When the sound of the fog horn was first heard on the port bow of the Steamship the engines should at once have been put full speed astern, and her helm should not have been changed.

See "The Luckenbach," 50 Fed. Rep. 129.
The "Midland," 48 Fed. Rep. 331.
The "Utopia," 1 Fed. Rep. 892.

A Steamship has been held in fault where she stopped and did not reverse.

The "Lancashire," Prob. Div. (1892),
Court of Appeal.

If in the case at bar the Steamship had stopped and reversed, no collision would have taken place, notwithstanding the high speed at which she was going.

The master at once followed the order to stop given to the engineer with full speed ahead.

Henry Record, p. 101 Ints. 68 and 69.

II.

That the Schooner "Golden Rule" was without fault.

This question, which is the main issue in the case and the only issue of fact raised by this appeal, can well be considered under four sub-divisions: —

(a) *The speed of the Schooner "Golden Rule"?*

(b) *What is a moderate rate of speed for a sailing vessel in a fog in the place where the collision took place?*

(c) *Was the Schooner "Golden Rule" proceeding at a moderate rate of speed under all the circumstances?*

(d) *Did the speed of the Schooner "Golden Rule" in any way contribute to the collision?*

(a) *The speed of the Schooner "Golden Rule"?*

The learned Judge of the District Court, in his opinion, gives the rate of speed as not less than seven or eight knots per hour.

This is clearly an error, as an examination of the evidence will disclose.

The persons who could best judge of the speed of the Schooner, and we submit that their testimony in all respects is clear, are her master and mate.

The master says from five (5) to six (6) knots.

Page, Record, p. 17, Int. 74.

Not quite six (6) knots.

Mullins, Record, p. 40, Ints. 147 and 148.

Between five (5) and six (6) knots.

Abbott, Record, pp. 52 and 53, Cross-Int. 139.

It is true that Williams, who had been *on deck the watch before* on cross-examination places the speed of the Schooner "Golden Rule" at between seven (7) and eight (8) knots; *but it should be remembered that when his deposition was taken he was employed on board of the Steamship "Chattahoochee."*

Williams, Record, p. 63, Int. 61.

He was at the wheel of the Schooner from twelve until two, and his idea of her speed would be governed by her speed at that time, when he had a good chance to observe it, and no doubt did, and which was greater than at the time of the collision.

Williams, Record, p. 61, Ints. 11–13.

Let us look at the facts which are not in dispute, to see what the speed was.

The Schooner was loaded deep with a heavy cargo.

It was not over a foot from the deck to the water.

Page, Record, p. 18, Int. 94.

The wind was heavier at twelve than at four.

Page, Record, p. 15, Int. 36.

Again the master says (Page, Record, p. 15, Int. 37):—

"Int. 37. And how did the wind continue from twelve to two? A. From twelve to two it increased a little; at two o'clock there was a fresh breeze,—I judged the vessel was going eight knots,—and at half-past two it commenced to moderate, and it moderated some after the fog shut down, and at daybreak it moderated still more, as it generally does at daybreak and sunset. The wind generally moderates at daybreak and sunset."

He took in the square sail between twelve and two.

Page, Record, p. 22, Cross-Ints. 161 and 162.

When asked by the learned Counsel for the Steamship, on cross-examination, he says:—

Page, Record, p. 22.

"X-Q. 163. Why did you take it in? A. I didn't want to go too fast.

"X-Q. 164. On account of the fog? A. No, it was not foggy then.

"X-Q. 165. You thought even without the fog you were going too fast with what sails you had set then, did you? A. No; I didn't want to get up on the coast until daylight.

"X-Q. 166. You were going so fast, with all your sails set, that you were afraid you would reach the land before daylight, — is that true? A. No; I took it in in case it became hazy; in case it became foggy.

"X-Q. 167. That sail is half a sail, isn't it? A. Yes, sir.

"X-Q. 168. Where did it come on the foremast, — what sails are below it? A. There are no sails below it.

"X-Q. 169. It is the lowest sail on the foremast, is it? A. Yes, sir.

"X-Q. 170. And that you say was taken in about two o'clock? A. About two o'clock."

The mate says there was not as much wind at four o'clock as there was at twelve.

Mullins, Record, p. 43, Int. 210.

That when he came on deck before the collision the Schooner was standing up perfectly straight.

Mullins, Record, p. 43, Int. 216.

Abbott says the wind was light at the time of the collision.

Abbott, Record, p. 53, Cross-Int. 140.

The mate says that the log shows she averaged about seven knots per hour from twelve to four.

Mullins, Record, p. 40, Cross-Int. 151.

The fog came in about 3.05 A. M.

Page, Record, p. 15, Int. 35.

Again her master says, Record, p. 17:—

"Q. 74. How fast do you think you were going at the time of the collision? A. Well, I couldn't judge correctly; between five and six knots. It was smooth. The vessel was standing straight up. *I had looked over her side sometime before that in regard to her speed, to see whether it was prudent to shorten sail, and I didn't. I considered it was just nice working speed. I could wear ship or tack ship or anything, and my yards were braced for that occasion in case I met another vessel, and she had the right of way.*"

If we take these facts, knowing that the ship ran twenty-eight miles from twelve to four,

Page, Record, p. 17, Int. 78,

and if we take the speed from twelve to two, when the square sail was on forward and the wind was stronger, as eight knots per hour, we would have twelve knots left to be run between two and four.

At 2.30 A. M. it commenced to moderate. If the speed for that half-hour was taken at the same rate, we would have eight knots to be run in the next hour and a half, with the wind moderating all the time, which, as we all know, always occurs when the fog comes in. Yet the average rate on that basis is only five and one-third knots per hour, therefore, the estimate of Captain Page of between five (5) and six (6) knots must have been a very frank one, and the rate must have been much nearer five (5) than six (6), if at all over five knots.

She was deeply loaded, had some of her sails taken in, and the wind was moderate. Surely her speed could not have been over five (5) knots per hour.

(b) *What is a moderate rate of speed for a sailing vessel in a fog in the place where the collision took place?*

We call the attention of the Court to the fact that there is not as yet a reported case where a sailing vessel has been held in fault for going at more than a moderate rate of speed in a fog in mid-ocean. All reported cases have

been those where they were either in narrow channels or in crowded waters.

In the case of the "John Hopkins," 13 Fed. Rep. 185, where a collision took place in a dense fog off Chatham, between a sailing vessel going at the rate of nine knots per hour, and a steamship going at the rate of about four knots per hour, the speed of the sailing vessel was held to be excessive in such a frequented place.

In the case of "The Rhode Island," 17 Fed. Rep. 554, Judge Brown held that eight knots was an excessive rate of speed for a sailing vessel in Long Island Sound near Eaton's Neck. A speed of about five (5) knots was held not to be excessive in the English Channel near Lizard Light off the port of Falmouth, where the collision was with a steamer.

In this case the steamship, which was a tugboat, was going between seven (7) and eight (8) knots, and was held alone in fault. She did not hear a fog signal from the sailing vessel.

The "N. Strong," L. R. (1892), P. Div. 103.

In the case of the "Elysia," 4 Asp. 540, the English House of Lords held that five (5) knots per hour was a moderate rate of speed in a fog for a sailing vessel with all sails set off the Banks of Newfoundland, where the steamship was held to blame for going at the rate of eight (8) knots per hour. In that case the steamship's witnesses estimated the speed of the sailing vessel at nine (9) knots.

The Court in that case states that the sailing vessel should be well under command, and that the speed in a narrow channel is not to be taken as a test for a sailing vessel.

In the case of the "Nacoochee," 137 U. S. 331, where the collision was off Cape May, the schooner, with all sail set, was going four (4) knots per hour, and the steamship between six (6) and seven (7) knots. The Steamship was held alone to blame. In that case all sail was set on board of the schooner.

In the case of "The Morning Light," 2 Wall. 550, the

Supreme Court of the United States held that a speed of from five (5) to six (6) knots per hour in a fog at night was not a fault for a sailing vessel at the entrance to Vineyard Sound.

In this connection the language on page 406 of Marsden on Collisions is important: "*It is submitted that the decisions as to what is a 'moderate' speed for small sailing ships bear heavily upon such vessels, and that they should not be carried any further.*"

In the case at bar the fog was not dense. Those on the Schooner saw the Steamship quite a distance off, which shows that in this case it was not a thick fog.

In England the Court has used the following language (Brown, L. J., in "The Beta," L. R. 9, P. Div. 134), in speaking of sailing vessels, viz: —

"*The term 'moderate' is a relative term: it depends on place, on the kind of ship, and on the kind of fog.*"

The case of the "Zadok" (L. R. 9, P. Div. 114), was the case of a collision in the English channel, where there were a great many vessels.

Here the Court holds that the "Zadok" was in fault under all of the circumstances.

Here there was no fault on the part of the steamer. The Court used the following language, p. 117: —

"Of course, in the case of a sailing vessel, we know that she must have way on to fill her sails, otherwise she will not have the power of controlling her movements."

Again, Sir James Hannon, says: —

"Some margin must be allowed for the particular circumstances of the case, and it is not to be said that exactly the same rule would apply to a sailing vessel out in mid-ocean; but when one has to deal with a case like this, of a vessel which is passing across a course in which it is to be expected that numerous vessels may be, it is her duty to reduce her speed, as I have said, to as low a rate as is consistent with her keeping a good steerage way."

In the case of the "N. Strong" (*supra*), the Court says: —

"*I agree that whether the position of the vessel is in the open sea, or in a river like the Thames, or off a difficult coast, is a matter which has to be taken into consideration.*"

We submit that the speed of the Schooner "Golden Rule" was moderate.

In the case of the "The Colorado" 91 U. S. 692, the sailing vessel was going between five (5) and six (6) knots.

In the "Martello," 153 U. S. 64 on p. 70, this Court says in regard to the speed of a steamship.

"While it is possible that a speed of six miles an hour *even in a dense fog*, may not be excessive upon the open ocean and off the frequented paths of commerce, a different rule applies to a steamer just emerging from the harbor of the largest port on the Atlantic coast, and in a neighborhood where she is likely to meet vessels approaching the harbor from at least a dozen points of the compass."

(c.) *Was the Schooner "Golden Rule" proceeding at more than a moderate rate of speed under all of the circumstances?*

The position of the Schooner "Golden Rule" was in mid-ocean; she was out of the usual track of ocean steamships.

Page, Record, p. 18, Int. 87.

The master of the "Chattahoochee" says he went outside to be out of the usual track of vessels.

Savage, Record, p. 69, Int. 23.

The master of the Schooner who knew that it was his duty to keep clear of all vessels that he should meet, except steam vessels, was bound to keep such speed on as to be able so to do.

It seems that he had been considering this when he took in part of his square sail.

In speaking of it he says, Page, Record, 17: —

"Q. 74. How fast do you think you were going at the time of the collision? A. Well, I couldn't judge correctly, — between five and six knots. It was smooth. The vessel was standing straight up. I had looked over her side sometime before that in regard to her speed, to see whether it was prudent to shorten sail, and I didn't; I considered it was just nice working speed, — I could wear ship or tack ship or anything, and my yards were braced for that occasion, in case I met another vessel and she had the right of way."

He thus shows that he had his vessel in such shape as to avoid those which the law required him to avoid.

According to the testimony of her captain, the Schooner "Golden Rule" was sailing only at the rate of speed that, considering the density of the fog, she could easily avoid any vessel whom she might meet, and which it was her duty under the law to keep clear of. This is the test of moderate speed that has been laid down by the different Courts of this country when applied to steamships.

Ships under sail cannot, of course, stop and reverse as can those under steam, but they must sail at such a rate in a fog that they can manœuvre sufficiently to avoid vessels having as to them the right of way.

Article 13 of the sailing rules applies not merely to a fog but also to a falling snow, and would be interpreted by the Court to apply to any kind of thick weather.

What then would be the duty of a sailing vessel in a snow-storm?

The fog was not dense; the Steamship was seen by those on board of the Schooner quite a distance.

Mullins the mate of the Schooner says four or five lengths of the steamship.

Mullins, Record, p. 36, Ints. 73 and 74.

Capt. Page says he should judge she was 2,000 feet away when he first saw her.

Page, Record, p. 17, Int. 65, and says, Int. 66.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

"Not very thick. It was a low fog; not one of those black dense fogs."

Abbott says five or six of her lengths.

Abbott, Record, p. 48, Int. 46.

Wilson says five or six lengths of the steamship.

Wilson, Record, p. 56, Int. 64.

On the Steamship Capt. Savage does not claim that it was a thick fog.

Savage, Record, p. 70.

In this connection the language of this Court in a recent case is important, viz.:

"*But in cases of this kind much depends upon the density of the fog, and something must be left to the judgment and discretion of the master. Precautions which might be indespensable in a fog so thick that vessels are invisible at a distance of three hundred feet, might become unnecessary and even burdensome if they may be seen a distance of one thousand feet.*"

The Umbria 166 U. S. 404–417.

The speed of the Schooner "Golden Rule" therefore did not contribute to the collision.

Even if the Court should find that the Schooner "Golden Rule" was in fault in proceeding at the rate of speed which she was sailing, still this speed did not contribute to or cause the collision.

The direct cause of the collision as heretofore shown was the fact that the Steamship "Chattahoochee" ported her helm and swung to starboard. At the time this was done, the "Chattahoochee" was going at full speed. If she had either held her course or put her helm to starboard, no collision would have taken place.

This is shown by a glance at the Exhibit annexed to this brief.

We desire to call the attention of the Court to the language used by Judge Lacombe in a similar case.

The "Martello," 39 Fed. Rep. 509.

"*Nor did the 'Willey's' speed prevent the 'Martello' from avoiding the collision, because, had the latter been going at a lower rate of speed, had she stopped her engines when she heard the 'Willey's' horn, and reversed (as she did) when she sighted the barkentine, she would have stopped short of the 'Willey's' track, whether the barkentine was going fast or slow.*"

That even if the speed of the Schooner was immoderate, this was not a fault which contributed to the collision.

It was the duty of the Schooner to hold her course, and not in any way to mislead the Steamship. If the Steamship had done what the law required her to do, if she had been going at a moderate rate of speed, or had stopped and reversed, or had not put her helm to port, or merely held her course, she would have gone clear of the Schooner and there would not have been a collision.

Her faults are clear, and the fault of the Schooner, at best, is one which did not cause the collision.

If the Steamship had held her course, no collision would have taken place, and this is acknowledged by her master.

Savage, Record, p. 79.

In the case at bar, gross faults of the Steamship are clearly shown, the only fault that is found against the Schooner being that she was proceeding at more than a proper rate of speed in a fog, under all the circumstances. It would seem that the rule that has been laid down by this Court in a number of cases, that where one vessel being found grossly in fault, the acts of the other will not be so particularly scrutinized, has a direct application to this case.

The "City of New York," 147 U. S. 72.

In that case, on page 85, this Court says :—

"In view of the recklessness with which the steamer was navigated that evening, it is no more than just that the evidence of contributory negligence on the part of the sailing vessel should be clear and convincing. Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption, at least, adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor."

This same doctrine was affirmed in the "Ludvig Holberg," 157 U. S. 60–71.

In the case of the "Umbria," 166 U. S. 404, which was a case of collision between the steamships in a fog near New York harbor, where the "Umbria" was going at a high rate of speed and the other at the rate of four (4) knots, the "Umbria" was held alone in fault, although the other vessel made a change of course.

This Court says, page 409 : —

"Indeed, so gross was the fault of the 'Umbria' in this connection, that we should unhesitatingly apply the rule laid down in the 'City of New York,' 147 U. S. 72, 85, and the 'Ludvig Holberg,' 157 U. S. 60, 71, that any doubts regarding the management of the other vessel, or the contribution of her faults, if any, to the collision, should be resolved in her favor."

In that case the change of course of a sailing vessel in a fog was held not to be such a fault as to cause a division of damages where the steamship was grossly in fault in going at an excessive rate of speed in a fog.

The language used in the "Comet," 9 Blachf. 323, has, in this case, great force : —

"The case is one for the application of the rule that a vessel which is primarily at fault for a collision cannot shift

its consequences in part upon the other vessel, without clear proof of the contributing negligence or fault of the latter. Her own negligence sufficiently accounts for the disaster." Cited with approval by the Circuit Court of Appeals for the Second Circuit, in the case of

The "John King," 49 Fed. Rep. 469.

"*A sailing vessel, in order to manœuvre, must have a speed sufficient to enable her to change her course and keep clear of vessels to whom she owes a duty.*"

On this question we submit that in none of the cases has a sailing vessel been held to blame in a collision with a steamship for going at a rate of speed in a fog in mid-ocean no greater than the speed of the "Golden Rule" at this time.

This Court, in a recent case, has again stated this rule in another form, which has special application to the case at bar: —

"As between these vessels, the fault of the "Victory" being obvious and inexcusable, the evidence to establish fault on the part of the "Plymothian" must be clear and convincing, in order to make a case for apportionment. The burden of proof is upon each vessel to establish fault on the part of the other."

The "Victory," 18 U. S. Supreme Ct. R. 149–155.

THE "GOLDEN RULE" HAD A PROPER LOOKOUT.

The Schooner "Golden Rule" had the right of way as far as the "Chattahoochee" was concerned, and as long as she performed her duty of holding her course and sounding her fog signal at regular intervals, that is all that could be asked of her.

The "Golden Rule" had a proper lookout stationed on the forecastle-head. Wilson went there at 4 A. M., at which time he relieved Williams, whom he found there.

Wilson, Record, p. 54.

Williams was there before that.

Williams, Record, p. 62, Ints. 14 to 22.

At the rate that the Steamship was going she would make a mile in five (5) minutes, so at the time that Wilson relieved Williams the vessels were over two (2) miles distant; from that time until the collision, the mate and Wilson were both on the forecastle-head of the Schooner, one attending to the horn and the other looking out.

Mullins, p. 36.

Wilson, pp. 54 and 55.

Capt. Page came on deck at 3.50 A. M., and was on deck from that time until the collision took place.

Page, Record, p. 15, Ints. 38 to 40.

THE FOG SIGNAL WAS A PROPER ONE, AND WAS SOUNDED AS REQUIRED BY LAW.

The horn that was used was a mechanical foghorn, and it was on the forecastle-head.

Page, Record, p. 16, Int. 51.

Mullins, Record, p. 34, Ints. 34 and 35.

Wilson, Record, p. 54, Int. 33.

The foghorn gave a good sound.

Page, Record, p. 16, Int. 53.

Wilson, Record, p. 54, Int. 34.

The foghorn was blown after 3.05 A. M. The number of blasts blown each time was three (3) blasts, and they followed the Steamship's whistles after they were heard.

Page, Record, p. 15, Int. 36; p. 16, Ints. 48–54.

Mullins, Record, p. 35, Ints. 53 and 54; p. 36, Ints. 63 to 66.

Abbott, Record, p. 47, Int. 29.

Wilson, Record, p. 54, Int. 32.

That the foghorn was a good sounding one is shown by the fact that the master of the Steamship spoke of it as a whistle.

Savage, Record, p. 77.

Before the blast of the horn died away, Captain Savage ordered his helm hard aport.

Savage, Record, p. 71, Int. 52.

He says he heard the horn twice before he saw the Schooner.

Savage, Record, p. 72, Int. 71.

"If I had heard his three whistles, I should have been obliged to do the same thing."

Savage, Record, p. 79.

No fault in this particular is found by either of the other Courts.

We submit that the Schooner "Golden Rule" was without fault.

III.

That if there was any fault on the part of the Schooner "Golden Rule," it was slight in comparison with the faults of the Steamship "Chattahoochee," and if sufficient to cause a division, the damages should be apportioned between the two vessels according to the degrees of fault.

The question of the division of damages when both vessels are at fault is discussed quite fully in a number of recent articles.

"Law Quarterly Review," vol. 12, p. 260 (July, 1896). By Louis Franck (of Antwerp).

"Law Quarterly Review," vol. 13, p. 17 (January, 1897).

"Law Quarterly Review, vol. 13, p. 241 (July, 1897). The two latter by Leslie F. Scott.

A paper entitled "Both to Blame" was read by F. W. Raikes at the conference of the Association for the Reform and Codification of the Law of Nations.

When both vessels are to blame four different rules are now applied, viz. : —

(1.) To allow no recovery.

This is the rule of the Netherlands (except when one vessel is at anchor, when the damage is divided), Germany (until January 1, 1900), Italy, Spain and some of the South American Republics.

(2.) To divide the loss in proportion to the value of the vessels in collision.

This rule is now confined to Turkey and Egypt. It seems to have been derived from the rule of "The Consoluto del Mare," in case of accidental damage.

(3.) To divide the loss between the two vessels according to the degree of fault.

This is the rule of France, Belgium, Norway, Sweden, and Denmark, and will be the rule in force in Germany when the new code is in full force (January 1, 1900).

(4.) To charge each vessel with one-half of the damage without regard to the degree of fault.

This is now the rule in England, in both the Admiralty and Common Law Courts.

The Rule of equal division of the damage where both vessels are to blame.

This rule has been firmly established in England since the decision of the House of Lords, in Hay *v.* Le Nerve, in 1824.

Marsden on Collisions (3d ed.), p. 154.

It has been applied to the cargo as well as to the ship, so that a cargo owner can only recover one-half damages of either vessel, provided both vessels are to blame.

The Milan, Lush. p. 388.

Lord Denman said of the English rule: "It is an arbitrary provision of the law of nations, not dictated by natural justice, nor, possibly, quite consistent with it."

De Vaux *v.* Salvador, 4 Ad. & El. 420.

Lord Selborne, L. C., in 1882, said, in the case of The Kehedive, 7 Ap. Cases, pp. 795–799: "That liability depends upon a rule of the Admiralty jurisdiction, which to myself has always seemed arbitrary."

The Rule in the United States.

The rule in the United States on the common law side of the Court is that there is no recovery.

The United States Courts sitting in Admiralty have always divided the loss between both vessels in cases of mutual fault. The division has usually been by an equal apportionment between the vessels at fault. The Admiralty law and the jurisdiction of the Court is created by the Constitution of the United States.

Constitution, Art. 3, Section 2.

In the case of the Lottawanna, 21 Wall. 558, this Court says: —

"The question as to the true limits of maritime law and Admiralty jurisdiction is . . . exclusively a judicial question."

In that case the Court says: —

"The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.'"

We are unable to find that when the Constitution was adopted there was any rule or custom in this country in regard to a division of loss in a case of collision when the fault lay with both vessels.

As we have before shown it was not until after the formation of the Constitution that the English Courts adopted their present rule.

The first case in this Court on the subject is that of the "Catharine," 17 Howard, 170, where this Court divided the loss between the two vessels, using the following language: —

"Under the circumstances usually attending these disasters, *we think the rule dividing the loss the most just and equitable.*"

Nothing is said how the division should be made, although from the language which precedes it it would seem the intention to adopt the English rule of division.

The case of "The Atlas," 93 U. S. 302, shows however that this Court did not intend to adopt the English rule, as it there held that the full amount of cargo damage was due from both vessels in case of mutual fault.

This Court has applied the rule of division of damages to other marine torts besides collision.

The "Max Morris," 137 U. S. 1, 13–14.

That this Court did not then consider the question to be settled would be inferred from the following language, viz.: —

"Whether, in a case like this, the decree should be for exactly one-half of the damages sustained, or might, in the discretion of the Court, be for a greater or less proportion of such damages is a question not presented for our determination upon this record, and we express no opinion upon it."

The "Max Morris," 137 U. S. 15.

The case was decided while the statute of 1872, making findings of fact of the Circuit Court final in Admiralty cases was in force.

The rule of apportioning the damages according to the

degree of fault was applied in this country to a case of collision in 1884.

The "Ida May," 20 Fed. Rep. 741.

The same rule was adopted by the Circuit Court of Appeals for the fourth circuit (1895).

The "Victory," 68 Fed. Rep. 395.

The language of Mr. Justice Story, in the case of the "Palmyra," 1 Wheat. 1–17, in this connection, is important.

"*In the Admiralty, the award of damages always rests in the discretion of the Court, under all circumstances.*"

In theory at least a division of damages in case of mutual fault in proportion to the degree of fault is one which is founded on principles of equity and mutual justice. The objections that have been made are wholly as to the practical operation of rule. We have, however, the examples of the maritime nations of continental Europe, and the fact that the rule has been adopted in Germany, as the law of that Empire after January 1, 1900.

Mr. Franck, in his article previously cited, claims that it is derived from the rule of the ancient maritime law.

It would seem however that both rules of division of damage are the creation of the present century.

The rule to be adopted is the one which is the most equitable.

The objections, which have been made to the practical working of the rule of proportional liability, are fully covered by the article of Mr. Scott to which we respectfully refer.

"Law Quarterly Review," Vol. 13 page 241.

The question of what rule is to govern in the United States has not been decided by this Court.

It is for this Court to determine which one will best work out substantial justice between all of the parties.

There is a strong feeling in England in favor of adopting the proportional rule, but the Courts there agree that their

present rule has been so firmly established by the Court of last resort that it can only be done by statutory enactment.

Germany, as has before been noted, has in its new code, already enacted and soon to go in force, adopted the proportional rule.

The whole question is open before this Court to determine. It can adopt the rule of division proportional to the degree of fault, as it has not committed itself to the English rule, but has repudiated it in some particulars.

If the Court should find that the Schooner "Golden Rule" was guilty of any fault contributing to the collision we contend that her owners should not be required to bear one-half of this burden.

IV.

The rule of damages in case of collision where there is mutual fault under the "Harter Act."

If the Court should find that the Schooner "Golden Rule" was at fault so that there should be a division of damages whether proportional or equal; we are then called upon to consider whether or not the Act of Congress of February 13, 1893, known as the Harter Act, has modified the previous rule of law in the matter of damages.

In the case of the "Delaware," 161 U. S. 459, this Court decided, that section 3 of this Act did not exempt the vessel in fault from liability to the other vessel, or to her cargo.

The Circuit Court of Appeals in its opinion intimates that this Act was not intended to apply to foreign vessels.

The whole history of the legislation leading to the passage of the Act shows that it was intended to apply to the steamship lines running between the United States and Europe all of which except one are foreign. This is shown by the history of the Act as disclosed in the record as found in the congressional debates.

24 Cong. Record 147, 148, 171, 172, 1180, 1291.

It has been applied to a foreign vessel in a number of cases.

The "Silvia," 64 Fed. Rep. 607; on appeal 68 Fed. Rep. 230.

The "Carib Prince," 63 Fed. Rep. 254; on appeal 68 Fed. Rep. 254.

The statutes limiting the liability of shipowners have been held to apply to foreign vessels even when for their benefit.

The "Scotland," 105 U. S. 24.

The language of section 3 of the Harter Act is:—

"That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel."

The words used are "*any vessel*" which clearly makes the act apply to foreign as well as domestic vessels coming within its provision.

It is clear, therefore, that the Schooner "Golden Rule" and her owners would not be liable to the owners of her cargo for any negligent navigation and no recovery could be had against them in that particular.

It may have been, therefore, the intention of the act to apply the English rule as contained in bills of lading.

If the Schooner "Golden Rule" or her owners would not have been liable to the owners of her cargo, then this liability cannot be set off against the liability of the Steamship "Chattahoochee."

This is the construction of the act in this particular as applied by Judge Addison Brown in "The Viola," 60 Fed. Rep. 296, 298.

In which the Court says:

"That the carrying vessel cannot be charged for any part of the loss suffered by her own cargo directly or indirectly, nor can any offset against her claim to damages be made by the other vessel on account of what the latter vessel must pay for that cargo damage; but that the same offset which would have been formerly allowed against the carrying vessel, or against the moneys payable to her, should now be deducted from the claim of her cargo."

The rule laid down by this Court in the case of "The North Star" 106 U. S. 17, cited by the Circuit Court of Appeals does not in any way conflict with this rule.

The case of "The North Star" (*supra*) was a case of the application of the act *limiting liability*, the liability still exists but the amount thereof is limited, whereas in the case of the Harter Act there is no liability from the owners of the Schooner "Golden Rule" to her cargo, so that the rule of limited liability does not apply.

We submit that the Schooner "Golden Rule" was without fault and her owners are entitled to full damages.

EUGENE P. CARVER.
EDWARD E. BLODGETT.
Of Counsel.